Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1335

ROBERT ABRAMS, as Attorney General of the State of New York,

Petitioner,

against

DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC.,

Respondents,

and

COUNTY OF MONROE, etc.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals Of The State of New York

BRIEF OF RESPONDENTS, DAVID S. SALLA, ROBERT W. KEPPLEY, and LISBON CONTRACTORS, INC. IN OPPOSITION TO BRIEF SUBMITTED BY RESPONDENT, COUNTY OF MONROE, IN SUPPORT OF PETITION FOR CERTIORARI

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The respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of the State of New York.

REASONS WHY THE WRIT SHOULD BE DENIED

1. ***The writ should be denied for the reasons set forth in the brief, dated March 24, 1980, submitted by respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc., in opposition to the petition for certiorari.***

Petitioner, Robert Abrams, as Attorney General of the State of New York, filed a petition for writ of certiorari in this Court on February 27, 1980. Respondents, David S. Salla, Robert W. Keppley, and Lisbon Contractors, Inc. (hereinafter referred to respectively as "Salla", "Keppley", and "Lisbon"), filed a brief, dated March 24, 1980, in opposition to the petition.

Respondent, County of Monroe (hereinafter referred to as "the County"), also petitioned for writ of certiorari and this petition was filed on March 24, 1980. However, it was determined by the Clerk of this Court that the petition was not timely filed. The County was, however, given permission to file a brief in support of the petition for certiorari and it did so by filing a brief, dated March 26, 1980, in this Court.

The arguments made by the County in its brief are essentially the arguments made by the State of New York in its petition for certiorari. These arguments were answered by Salla, Keppley and Lisbon in their brief in opposition. The positions advanced by Salla, Keppley, and Lisbon in their brief in opposition need not be repeated here, but they respectfully refer this Court to the arguments made in their earlier brief and incorporate these arguments by reference in this brief. There is only one additional argument which they wish to bring to this Court's attention, and this additional argument is set forth in the material which follows.

2. ***The Congressional intent with respect to §222 of the Labor Law has been made clear in various federal regulations and in memoranda of law filed by the United States in a case involving the applicability of §222 to projects funded by the Environmental Protection Agency.***

In its brief (page 3), the County argues that there is nothing in the record of this case to indicate that Congress, in enacting the legislation that gave rise to the construction project in issue (the Environmental Protection Act and Pure Waters Act), placed any restriction on New York's ability to limit employment to New York residents. It argues that this Court's statement in *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 390, n. 23 (1978), indicates that the alleged absence of Congressional restrictions on the grants of funds to New York is a significant fact to be considered in any analysis of statutes like §222.

As pointed out by Salla, Keppley and Lisbon in their earlier brief (pages 7-8), the activity involved in *Baldwin* was not so basic and fundamental that interference with it would frustrate the very purpose of the Union. This Court consistently contrasted the right to engage in activities like recreational game hunting with fundamental rights such as the right of a non-resident to "pursue a livelihood in a state other than his own [which is] a right that is protected by the Privileges and Immunities Clause." *Id.* at 386.

Even apart from this argument, however, there are specific federal regulations dealing with the award of grants by the Environmental Protection Agency to state and local governments. All of the grants are subject to the provisions of the regulations contained in 40 C.F.R., Part 35 (1979). [40 C.F.R. §35.002 (1979)]. An analysis of these regulations demonstrates that laws such as §222 are in conflict with federal requirements.

Three sections of Part 35 are particularly applicable. Pursuant to 40 C.F.R. §35.840 (b) (1979), ". . . the award of the contract will

be made to the responsible bidder submitting the lowest responsive bid, which shall be determined without regard to State or local law whereby preference is given on factors other than the amount bid." In addition, 40 C.F.R. §35.938-4 (h) (4) (1979) provides that "State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids." Almost identical language is contained in 40 C.F.R. §35.936-2 (c) (1979) which provides that "State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant."

In an action in the United States District Court for the Western District of New York, the United States took the position that §222 is in conflict with the federal regulations just cited. In *Hunt, et al. v. Firelands Sewer and Water Construction Co., Inc., et al.* (Civil Action No. 75-425), a group of unemployed construction workers brought an action against various town and public officials for failing to enforce §222 of the Labor Law. The town officials, facing the possible loss of federal funds if they enforced §222, and the possible loss of state funds if they failed to enforce §222 commenced a third-party declaratory judgment action against the United States.

In both his memorandum of law and reply memorandum of law submitted in that case, the United States Attorney specifically stated that §222 was in conflict with several regulations contained in Title 40, Part 35. He pointed out that, pursuant to §222, an out-of-state company would be barred from using its usual work force if its usual work force was composed of non-New York residents. In such a case, the out-of-state bidder would have to hire new key operating personnel and a new foreman to supervise the work, thereby placing the out-of-state bidder at a serious disadvantage.

The United States Attorney argued that by discouraging the submission of bids by out-of-state contractors, §222 was frustrating the free and open competition mandated by the federal regulations. He concluded in his reply memorandum of law that there existed "a total incompatibility between Section 222 and the EPA regulations." (Page 14 of reply memorandum of law, dated December 17, 1975).

Although there was never a decision rendered in *Hunt, et al. v. Firelands Sewer and Water Construction Co., Inc., et al.*, this Court can take judicial notice of the position of the United States in that case. *Happy Investment Group v. Lakeworld Properties, Inc.*, 396 F. Supp. 175, 183, n. 6 (N.D. Cal. 1975). The position of the United States is consistent with the applicable federal regulations. Clearly, §222 is in direct conflict with the purposes of the Environmental Protection Act and the regulations promulgated by the Environmental Protection Agency.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Dated: April 2, 1980
Rochester, New York

Respectfully submitted,

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